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No. 323

IN THE

Supreme Court of the United States

October Term 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Respondent, American Society of Composers, Authors and Publishers, respectfully requests this Court to amend the last sentence of its *per curiam* opinion of October 21, 1963, and remand the cause to the Court of Appeals for "further proceedings not inconsistent with this opinion", instead of "for consideration on its merits", as the opinion now provides.

In its *per curiam* opinion, this Court concluded that "the controversy . . . disposed of by the District Court's order" was "entirely between private parties" and, therefore, the appeal sought by petitioners is not one within the

coverage of the Expediting Act. The Court then held that an appeal by petitioners does lie from the District Court's order to the Court of Appeals under 28 U.S.C. § 1291.

Nothing in the opinion indicates that the Court considered the further and necessary question of the timeliness of petitioners' attempted appeal to the Court of Appeals.

Rule 73(a) of the Federal Rules of Civil Procedure provides that a notice of appeal to the Court of Appeals shall be filed within 30 days from the entry of judgment in the District Court, except that where the United States is a party, 60 days shall be allowed for filing a notice of appeal.

Respondent has contended before both the Court of Appeals* and this Court** that, if petitioners' attempted appeal is not within the reach of the Expediting Act, petitioners failed to perfect their appeal to the Court of Appeals because they did not comply with the 30-day requirement of Rule 73(a). Petitioners filed their notice of appeal with the Court of Appeals 57 days after the entry of the order of the District Court dismissing their petition.

Whether to allow 60 days for an appeal where the controversy is "entirely between private parties" and is not one in which the Government is "directly concerned", as this Court has now found, is a question which the Court of Appeals should be left free to answer before it proceeds to consider the merits of the appeal. As the Court of Appeals

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* Appellee's Brief in Court of Appeals, pp. 22-24.

** Respondent's Brief in Opposition to Petition for Certiorari, p. 8.

for the Fifth Circuit stated in *Virginia Land Co.* v. *Miami Shipbuilding Corp., et al.*, 201 F. 2d 506, 508 (5th Cir. 1953):

> "The whole basis of the [60-day] exception, as is shown in the note of the Advisory Committee on Rules, pp. 428-429, 28 U.S.C.A., Rule 52 to End, Federal Rules of Civil Procedure, was the affording to others in respect of matters, in which the United States was interested, the same time for appeal which had been extended to the United States. *It was not intended to change the rule in respect to appeals by other persons from orders with which the United States had no concern simply because of the fact that the United States was a party to the proceeding below but not to the issues involved in the appeal.*" (Emphasis added.)

Failure to file a notice of appeal within the time limits contained in Rule 73(a) constitutes a jurisdictional defect which bars an appeal. *Martin* v. *Hess*, 176 F. 2d 834, 835 (6th Cir. 1949); *Edwards* v. *Doctors Hospital, Inc.*, 242 F. 2d 888, 891 (2d Cir. 1957); *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (8th Cir. 1958). Neither the Court of Appeals, in its dismissal of petitioners' attempted appeal thereto, nor this Court, in its opinion reversing the judgment of the Court of Appeals, reached or discussed this necessary jurisdictional issue. But the language of this Court's opinion, in remanding the cause to the Court of Appeals "for consideration on its merits", could give rise to an argument by the appellants that the decision of this Court precludes the Court of Appeals from considering this jurisdictional issue.

We therefore request that the opinion and mandate of this Court be modified in the manner suggested above.

Precedent for this treatment can be found in *Union Trust Co.* v. *Eastern Airlines,* 350 U.S. 962 (1956), where this Court, upon consideration of a petition for rehearing following a summary reversal, modified its previous order by directing "that the case be remanded to the Court of Appeals to permit that Court to pass upon the several issues left undecided by our reversal of its judgment."

Respectfully submitted,

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November 7, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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